(1)

87-153

No. 87-

Supreme Court, U.S.
FILED
JUL 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

UNITED STATES SUPREME COURT

October Term 1987

MR. W. FIREWORKS, INC.,

Petitioner,

v.

WILLIAM E. BROCK,
Secretary of Labor,
United States Department
of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Martha E. Johnston
700 Southeastern Building
Greensboro, NC 27401
(919) 274-2992

Counsel of Record

OF COUNSEL:

Norman B. Smith
Smith, Patterson, Follin,
Curtis, James & Harkavy
700 Southeastern Building
Greensboro, NC 27401

L. Bruce Fryburger
1441 Frost Tower
San Antonio, Texas 78205

35pp

QUESTIONS PRESENTED

I. Did the Court of Appeals misapply the clearly erroneous standard of Rule 52(a), and ignore this Court's decision in Anderson v. City of Bessemer City, 470 U.S. 564 (1985), in holding numerous factual findings of the district court to be clearly erroneous, even while acknowledging that those findings were supported in the record?

II. Did the Court of Appeals erroneously construe Icicle Seafoods, Inc., v. Worthington, ____ U.S. ____, 89 L.Ed.2d 739 (1986), in holding the question of "employee" or "independent contractor" status under the Fair Labor Standards Act to be a legal conclusion rather than a factual inference subject to the clearly erroneous rule?

PARTIES

The parties to this proceeding are the petitioner (defendant below), Mr. W. Fireworks, Inc., a closely-held corporation with no parent companies, affiliates, or subsidiaries, and respondent (plaintiff below) William Brock, Secretary of Labor, United States Department of Labor.

TABLE OF CONTENTS

	Page
Questions Presented.....	i
Parties.....	ii
Table of Authorities.....	iv
Opinions Below.....	1
Jurisdiction.....	2
Statutes and Rule.....	2
Statement of the Case.....	5
Reasons for Granting the Writ.....	14
I. THE COURT BELOW SET ASIDE VIRTUALLY ALL THE DISTRICT COURT'S FINDINGS OF HISTORICAL FACT, AND THE INFERENCES BASED THEREON, WITHOUT REGARD TO THE SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTING THOSE FINDINGS, THUS MISAPPLYING THE CLEARLY ERRONEOUS STANDARD OF RULE 52(a) AND IGNORING APPLICABLE DECISIONS OF THIS COURT.....	14
II. THE COURT OF APPEALS ERRONEOUSLY TREATED THE QUESTION OF EMPLOYEE STATUS UNDER THE FLSA AS A LEGAL CONCLUSION, THEREBY CHANGING A FACTUAL FINDING OF THE DISTRICT COURT WITHOUT FINDING IT CLEARLY ERRONEOUS, AND MISAPPLYING ICICLE SEAFOODS, INC. v. WORTHINGTON, ____ U.S. ____, 89 L.Ed.2d 739.....	25
Conclusion.....	29

TABLE OF AUTHORITIES

Cases	Page
Anderson v. City of Bessemer City 470 U.S. 564 (1985)	16,24
Donovan v. Sabine Irrigation Co.,Inc. 695 F.2d 190 (5th Cir. 1983)	28
Hodgson v. Griffin and Brand of McAllen, Inc. 471 F.2d 235 (5th Cir. 1973)	28
Icicle Seafoods, Inc. v. Worthington, ___ U.S. ___ 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986)	25,26, 27,28
Levinson v. Spector Motor Service 330 U.S. 649 (1947)	26
Pullman-Standard v. Swint 456 U.S. 273 (1982)	16
Rutherford Food Corp. v. McComb 331 U.S. 722 (1947)	26
United States v. Silk 331 U.S. 704 (1947)	15
Walling v. General Industries, Co. 330 U.S. 545 (1947)	26
Wirtz v. Lone Star Steel Co. 405 F.2d 668 (5th Cir. 1968)	28

Rules	
Rule 52(a), Fed.R.Civ.Pro.	passim

No. 87-

UNITED STATES SUPREME COURT

October Term 1987

MR. W. FIREWORKS, INC.,	)
	)
Petitioner,	)
	)
v.	)
	)
WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner Mr. W Fireworks, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 20, 1987.

OPINIONS BELOW

The decision of the court of appeals is reported at 814 F.2d 1042 and appears at

pp. A1-A63 in the separate Appendix to this Petition. The judgment of the district court is not reported and is set out at pp. A66-A85.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1987. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES AND RULES

29 U.S.C. Sec. 203(d)(e):

> (d) "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e)(1) Except as provided in paragraphs (2),(3), and (4) the term "employee" means any individual employed by an

employer.

29 U.S.C. Sec. 206(a):

> Every employer shall pay to each of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:
>
> . . . .

29 U.S.C. Sec. 207(a)(1):

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a work week longer than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1-1/2 times the regular rate at which he is employed.
>
> . . . .

29 U.S.C. Sec. 211(c):

> Every employer subject to any provision of this chapter or of any order issued under this

chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in Section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

Rule 52(A), Federal Rules of Civil Procedure, 28 U.S.C.:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of

> fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of Fact and Conclusions of Law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

The Secretary of Labor brought suit against Mr. W. Fireworks, Inc., on November 16, 1983 in the Western District of Texas, alleging violations of the record keeping, minimum wage, and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. Sec. 201, et seq. The basis for jurisdiction in the district court was 29 U.S.C.

Sec. 217 and 28 U.S.C. Sec. 1337.

Mr. W Fireworks, Inc., denied the allegations, asserting first, that vendors of its fireworks were independent contractors and thus outside the coverage of the FLSA; second, that the operation of fireworks stands were exempt from the wage and hour laws as amusement and recreational activities pursuant to 29 U.S.C. Sec. 213 (a)(3); third, that the fireworks vendors were exempt from the wage and hour laws as outside salesmen in accordance with 29 U.S.C. Sec. 213(a)(1); and fourth, that the commissions received by the fireworks vendors were sufficient to have discharged any liability that defendant may have had, as provided in 29 U.S.C. Sec. 207(i).

The case was tried to the district court without a jury from July 29 through July 31, 1985. Officers of Mr. W Fireworks, Inc., and a number of fireworks

vendors testified on both sides of the case. On January 29, 1986, the district court issued a memorandum opinion and judgment finding and concluding that the fireworks vendors were independent contractors rather than employees, and thus outside the coverage of the FLSA. (A66-A85).

Plaintiff appealed, and the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court, by opinion and order entered on April 20, 1987. The court ruled only on the independent contractor issue, remanding the issues of the possible exemption of Mr. W. Fireworks, Inc. from the FLSA under the "amusement or recreational" establishment exemption, or under the "outside salesmen" exemption to be addressed first by the district court.

Petitioner/defendant, Mr. W. Fireworks, Inc., is a family- owned corporation which has been in the business of importing and distributing fireworks in south Texas for about 25 years. Fireworks may be sold lawfully in the State of Texas only during two periods, referred to as "seasons": June 23 to July 5, and December 19 to January 2.

Defendant distributes fireworks through individual vendors, who operate wooden fireworks sales stands constructed by Mr. W. Defendant leases the land at various sites, places the stands, and bears the cost of electrical service to the stands. Before each season, Mr. W. advertises for vendors to operate the stands. About 20% of the operators repeat from one season to the next; the other 80% change each season.

Defendant enters into contracts with the vendors, which provide for their

receipt of fireworks on consignment from the defendant. The operators pick up their inventory of fireworks from Mr. W's warehouse the day before the season begins, and set up their display at the location they have chosen or been assigned. They hire their own employees to help them operate the stands. During the course of the season they may order additional inventory from Mr. W. which is delivered by a routeman who also picks up the cash proceeds if the vendors desire. At the end of the season they return any unsold inventory to Mr. W. and receive a 15% commission of the proceeds from the fireworks sold. Any errors or lost inventory are deducted from the proceeds paid to the operators.

From 1980 through January 1983, each vendor signed a set of defendant's "Rules and Regulations"; in subsequent seasons,

each vendor signed an "Independent Contractor Checklist". Most of the provisions on this document are restatements of state legal and regulatory requirements, such as not permitting smoking or setting off fireworks in close proximity to the fireworks stands, keeping the grass mowed and trash removed around the stands, and not selling fireworks to intoxicated persons. Because of a regulatory requirement that firework stands used for overnight storage of fireworks must be kept secure and equipped with suitable locking devices to prevent unauthorized entry, and because the light construction and portable nature of the stands makes this rule unenforceable through security devices alone, one of defendant's checklist items requires that the operators attend the stands 24 hours a day.

The "Rules and Regulations" forms

that were in use through January 1983, but not the "Independent Contractor Checklist" forms in use after that time, also stated that vendors must not sell goods other than fireworks purchased from defendant, that certain sales hours must be observed, and that defendant's prescribed resale pricing was to be followed. However, none of these provisions was ever enforced. After the adoption of the latter checklist, the hours of operation of 9:00 a.m. to 12:00 midnight were recommended, but not required. Defendant supplied a list of recommended prices and price tags, but these were not required to be followed. Vendors were also allowed to sell goods other than defendant's fireworks at the stands if they wished. Testimony from the operators at trial indicated that while many vendors chose to follow defendant's recommendations as to hours of operation and prices, others

deviated from those recommendations if they wished. Additionally, a number of vendors sold other goods at their stands, including fruit, Christmas trees, and toys.

None of the vendors who testified at trial regarded the fireworks business as their primary source of income. Many of them held responsible positions of employment, and operated their fireworks businesses at nights and on weekends or used their vacation time to work during the fireworks seasons. A great many of the vendors were college graduates, and some held advanced degrees.

Many of the stand operators invested capital of their own in their business, by placing advertising, and erecting signs or using promotional devices such as clowns to attract customers to their stands. Additionally, some operators purchased campers or tents in which to sleep near their

stands, telephone service for the stands, extra security measures, electronic calculators or cash registers, heaters, fans, and portable toilets. They paid for trash removal and maintenance of the grounds around their stands, and some purchased gravel, hay, or wooden pallets to alleviate muddy conditions.

The fireworks vendors earn an average of $1200 per 11- to 13-day season, but they can earn a great deal more than that, depending on their experience, skill and initiative. The evidence showed that overall good management, including an understanding of the products sold and the nature and peak times of customer demand, made a big difference in stand profitability. Neatness and attractiveness of the stand and the fireworks displays, as well as courtesy and rapport with customers, were found by experienced vendors to be

important ingredients of success.

The contracts between the defendant and the vendors provide that the vendors are independent contractors and not subject to the control of the defendant. Many of the operators testified that they considered the fireworks stands to be their own businesses and not the businesses of the defendant. Several of them testified that they would not have operated their firework stands for hourly wages.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW SET ASIDE VIRTUALLY ALL THE DISTRICT COURT'S FINDINGS OF HISTORICAL FACT, AND THE INFERENCES BASED THEREON, WITHOUT REGARD TO THE SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTING THOSE FINDINGS, THUS MISAPPLYING THE CLEARLY ERRONEOUS STANDARD OF RULE 52(a) AND IGNORING APPLICABLE DECISIONS OF THIS COURT.

The district court, after hearing three days of testimony from defendant's employees and numerous fireworks vendors, wrote a carefully reasoned opinion analyz-

ing the employee-independent contractor question by applying the five considerations delineated in United States v. Silk, 331 U.S. 704 (1947): degree of control, opportunities for profit or loss, investment in facilities, permanency of the relationship, and skill required. After detailing the evidence under each of these factors, the court found that the fireworks vendors were not economically dependent on Mr. W. Fireworks, Inc. and therefore that they are independent contractors, not employees. The court of appeals, after stating that the district court had correctly identified the five Silk factors in making its analysis, and acknowledging that its findings as to the existence of those factors were subject to the clearly erroneous standard of review, then applied the same five factors and made opposite findings on each. Because the district

court's findings were based on an entirely permissible view of the evidence, the court of appeals overstepped the bounds of its duty under Rule 52(a) in setting aside those findings in favor of its own view of the evidence. In doing so, the Fifth Circuit ignored the admonishments contained in Pullman-Standard v. Swint, 456 U.S. 273 (1982) and Anderson v. City of Bessemer City, 470 U.S. 564 (1985).

In its review of the evidence under each of the Silk factors, the Fifth Circuit dismissed virtually every finding of the district court as either clearly erroneous, drawn from the wrong legal standard, or "legally irrelevant". Yet a review of both opinions reveals that the evidence in the record, while it was, not surprisingly, in conflict, fully supported the district court's findings. Thus, on the issue of "control," the district court found that

although the operators received a list of suggested prices with their initial inventory, they considered them to be only suggested prices, felt free to change them if they wished, and sometimes did change them depending on how well an item sold. The court of appeals, however, considered this finding clearly erroneous because only three operators testified that they occasionally reduced prices, while ten stated that they never did. Many of those ten, the court noted, indicated that they felt compelled to adhere to the suggested prices. The court failed to note that many of those operators also stated that they did not feel compelled to follow Mr. W's price list, but did so simply because they assumed it would maximize their profits. Likewise, the court of appeals chided the district court for finding that many operators varied the suggested hours of

operation, or the suggested display instructions, when many operators also did not do so. The Fifth Circuit dismissed as "legally irrelevant" to the control issue the district court's finding that some operators made improvements to their stands, sold other merchandise at their stands, and preferred being paid by commission. Thereupon, it reversed the district court's finding on the control factor and substituted its own, that Mr. W. Fireworks controlled the operators.

On the factor of opportunity for profit and loss, the district court found that the operators could greatly affect their profits by investing in extra advertising or promotion, and by gaining experience concerning display, types of fireworks, and customer courtesy. In fact, all the operators who testified they had worked more than one season stated that

they increased their profits as they became more experienced. Additionally, the court found that the operators risked substantial losses because they were responsible for the inventory; one showed a cash loss of approximately $3,000, and one operator an inventory loss of approximately $1800. The court of appeals, however, stated that "[C]ontrary to the district court's findings, we have already held that Mr. W controlled the prices at which the operators sold the fireworks, and, in large part, the advertising." In that court's opinion, those factors that it had already determined to be controlled by Mr. W. outweighed any findings of the district court on the opportunity for profit and loss, and it therefore found the opportunity for profit and loss to be controlled mainly by Mr. W.

On the factor of "investment", the

BEST AVAILABLE COPY

district court recited numerous items that many vendors testified they paid for themselves in connection with the operation of their stands, such as campers, trailers, cash registers, adding machines, fans, heaters, telephones, paint and lights. The court noted that the more successful operators generally had invested more money in their businesses in order to increase their profits, which was typical of an independent contractor. The Fifth Circuit disagreed with many of these findings, apparently because the evidence did not show that all operators made large investments in their stands. In the opinion of the court of appeals, the investments that they did make were irrelevant, because Mr. W made the much larger investment of buying the fireworks and supplying the stands. Similarly, the court of appeals dismissed the district court's finding that

many operators displayed "skill and initiative" in operating the stands and thereby increased their profits. Disregarding the evidence that many operators felt it was critical to their profits that they learn to gauge the customer demand for particular items and the peak times of demand and to hire their employees accordingly, the court of appeals held that the operators did not exhibit sufficient independent skill or initiative to indicate that they were independent contractors.

Finally, on the issue of "permanency", the court of appeals indulged in blatant misreading of the record while cavalierly dismissing the district court's analysis of this factor as "the most important of all." In the opinion of the court of appeals, it was insignificant that almost all of the vendors had full-time jobs and worked for defendant only to make extra

money during holidays and vacation. Yet the court of appeals likened these vendors to migrant farm workers, who are utterly dependent on a succession of crop harvesting jobs in various parts of the country. There was no evidence that these vendors drifted from fireworks stand to fireworks stand in order to eke out a living. In finding that these fireworks vendors must be considered "permanent" employees of Mr. W. the court stated: "the record establishes beyond cavil that every operator who ever worked for Mr. W. labored through the entire fireworks season." In fact, the evidence was that Mr. W had never terminated any vendors during a season; there was no testimony that vendors had never voluntarily quit their stands in the midst of a fireworks season. Furthermore, there is an 80% turnover in defendant's vendors between each season.

Not surprisingly, after it had discarded all of the district court's factual findings and substituted its own, the court of appeals rejected what it characterized as the district court's "ultimate conclusion" that the fireworks operators were independent contractors, and concluded instead that they were employees subject to the controls of the FLSA. What the court of appeals actually did was to duplicate the role of the district court and engage in its own fact finding, in order to arrive at the conclusion the court of appeals would have reached, had it been sitting as the trier of fact. As the district court recognized, there was evidence pointing both ways on all of the factors to be considered under the Silk analysis. The district court made its determination based upon its assessment of the weight of the testimony of various

operators and their credibility, and then drew its inferences from these factual findings. Both of these types of findings were entitled to the deference required by Rule 52(a).

Clearly there were two permissible views of the evidence in this case, and the court of appeals simply chose the opposite view from the district court. In doing so it disregarded this Court's holding in Anderson v. City of Bessemer City, 470 U.S. 564 (1985), citing only Justice Powell's concurring opinion in that case for the proposition that the clearly erroneous standard must not serve as an excuse for the court of appeals to abrogate its "role and duty as a reviewing court." This intentional disregard of the standard so strongly and recently announced in Bessemer City constitutes such a departure from the accepted and usual course of

judicial proceedings as to call for an exercise of this court's power of supervision.

II. THE COURT OF APPEALS ERRONEOUSLY TREATED THE QUESTION OF EMPLOYEE STATUS UNDER THE FLSA AS A LEGAL CONCLUSION, THEREBY CHANGING A FACTUAL FINDING OF THE DISTRICT COURT WITHOUT FINDING IT CLEARLY ERRONEOUS, AND MISAPPLYING ICICLE SEAFOODS, Inc., v. WORTHINGTON, ____ U.S. ____, 89 L.Ed.2d 739 (1986).

While at least acknowledging that the district court's findings as to the existence of the Silk factors must be considered factual findings subject to the clearly erroneous rule, the Fifth Circuit adopted the Secretary of Labor's position that "[T]he ultimate finding as to employee status is not simply a factual inference drawn from historical facts, but more accurately is a legal conclusion based on factual inferences drawn from historical facts." Although the court declared that its ruling was supported by this Court's recent decision in Icicle Seafoods, the

court of appeals' ruling in fact conflicts with the Icicle Seafoods holding and with many of its own prior decisions.

In Icicle Seafoods, Inc. v. Worthington, ____ U.S. ____, 89 L.Ed.2d 739 (1986), the Court dealt with the question of an FLSA exclusion for "any employee employed as a seaman." Noting that the Court of Appeals for the Ninth Circuit had pointed out the conflicting standards of review applied to claims of exclusion from the FLSA in various circuits, the Court reviewed three prior decisions in this area: Walling v. General Industries Co., 330 U.S. 545 (1947); Levinson v. Spector Motor Service, 330 U.S. 649 (1947); and Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947). This Court reaffirmed its holding in Walling "that whether an employee falls within the exclusion for 'executives' under 29 U.S.C. Sec. 213(a)(1)

is a factual question subject to the 'clearly erroneous' standard of review set forth in Rule 52(a) of the Federal Rules of Civil Procedure." 89 L.Ed.2d at 743. It stated that neither Levinson nor Rutherford should be read to depart from the rule laid down in Walling. The Court disapproved of the application of a de novo standard of review to the application of the exemption to the facts in Icicle Seafoods, while reaffirming its holding in Walling "that the facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case should be reviewed by the courts of appeals pursuant to Rule 52(a), like the facts in other civil bench-tried litigation in federal courts." 89 L.Ed.2d at 744.

Although the reference to Walling should make clear that the Court intended any exempt status under the FLSA to be

reviewed pursuant to Rule 52(a), the Fifth Circuit has in this case interpreted Icicle Seafoods to support its ruling that the question of employee status is one of law subject to plenary review by the courts of appeals. In doing so the court also chose to reject its own prior cases holding to the contrary: Wirtz v. Lone Star Steel Company, 405 F.2d 668 (5th Cir. 1968); Hodgson v. Griffin and Brand of McAllen, Inc., 471 F.2d 235 (5th Cir. 1973); and Donovan v.Sabine Irrigation Co., Inc., 695 F.2d 190 (5th Cir. 1983).

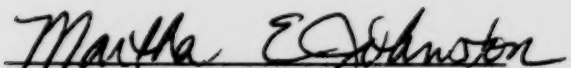
The Fifth Circuit's misinterpretation of the Icicle Seafoods holding resulted in its application of a de novo standard of review to the district court's ultimate determination that the fireworks vendors in this case were independent contractors and not employees. This Court's writ should issue to correct the court of appeals' view

of the appropriate standard of review in this area, because it is a constantly recurring question that is of central importance to the operation of the federal court system.

CONCLUSION

For all of these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



Martha E. Johnston
Smith, Patterson, Follin,
Curtis, James & Harkavy
700 Southeastern Building
Greensboro, NC 27401
(919) 274-2992

Counsel of Record

Of Counsel:

Norman B. Smith
Smith, Patterson, Follin,
Curtis, James & Harkavy
700 Southeastern Building
Greensboro, NC 27401
(919) 274-2992

L. Bruce Fryburger
1441 Frost Tower
San Antonio, Texas 78205